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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re International Restaurant Group, L.L.C.

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Serial No. 76/004,737

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John S. Egbert of Harrison & Egbert for International  
Restaurant Group, L.L.C.

David C. Reihner, Trademark Examining Attorney, Law Office  
107 (Thomas Lamone, Managing Attorney).

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Before Simms, Bottorff and Drost, Administrative Trademark  
Judges.

Opinion by Drost, Administrative Trademark Judge:

On March 17, 2000, International Restaurant Group,  
L.L.C. (applicant) filed an application to register the  
mark DIAMONDBACK'S A TEXAS BISTRO (in typed form) on the  
Principal Register for "restaurant services" in  
International Class 42.<sup>1</sup> Applicant has disclaimed the  
phrase "A Texas Bistro."

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<sup>1</sup> Serial No. 76/004,737. The application contains an allegation  
of first use and first use in commerce of September 14, 1998.

The examining attorney ultimately refused to register applicant's mark under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because of a prior registration for the mark DIAMONDBACK (in typed form) also for restaurant services.<sup>2</sup>

When the refusal was made final, applicant filed this appeal.

The examining attorney argues that "the marks of the parties are similar because applicant has taken the typed mark of registrant and added to it subordinate, geographical, and descriptive matter forming a typed mark similar in meaning to registrant's mark. When the identical services of the parties are identified with their respective marks, the patrons of the restaurants would likely be confused about the sources of the services of the parties." Brief at 3.<sup>3</sup>

Applicant maintains that DIAMONDBACK is a weak mark, the marks differ in commercial impression, there is a large geographical distance between the locations, and that "restaurant selection is not an 'impulse buy' and should be

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<sup>2</sup> Registration No. 1,973,717, issued May 14, 1996. Affidavits under §§ 8 and 15 accepted or acknowledged.

<sup>3</sup> The examining attorney also objects to new evidence that applicant has attached to its brief. We agree with the examining attorney's objection and we will not consider this evidence for the first time on appeal. 37 CFR § 2.142(d).

accorded the status of having sophisticated consumers." Brief at 3.

We affirm.

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000).

We start by noting that both applicant and registrant offer restaurant services and the services are identified as "restaurant services" in the application and registration. Therefore, the services are identical. In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) (Applicant's restaurant services identified as "restaurant services specializing in Southern-style cuisine" legally identical to registrant's restaurant services identified as "hotel, motel, and restaurant services"). Any differences between how the services are actually provided are legally irrelevant. Id. at 1534 (quotation marks omitted) ("[T]he second DuPont factor expressly mandates consideration of the similarity

or dissimilarity of the services as described in the application or registration").

Next, we turn to the similarity of the marks. "If the services are identical, 'the degree of similarity necessary to support a conclusion of likelihood of confusion declines.'" Dixie Restaurants, 41 USPQ2d at 1534, quoting, Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). The question here is whether the marks create the same commercial impression. The test is not whether the marks can be distinguished in a side-by-side comparison, but whether they are sufficiently similar in their overall commercial impression so that confusion as to the source of the services marketed under the respective marks is likely to result. "[T]here is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of the mark, provided [that] the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Here, both marks contain the same word DIAMONDBACK in typed form. Applicant adds the letter "'S" and the disclaimed phrase "A Texas Bistro." Applicant argues that the "significance of the commercial impression as applied

to the Applicant's services is that Applicant is located in the Southwest, namely, Texas. It could be argued that the registrant's commercial impression is in relation to the famous ski and bike trails of the North Carolina area, from which the name 'DIAMONDBACK' is taken." Brief at 4. We disagree. Applicant has taken the entire registered mark and added subordinate matter to the mark that does not change the commercial impression. "Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'" Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting, National Data, 224 USPQ2d at 752. While applicant argues that its mark creates the impression of a "small café located in the Southwest serving tex-mex food" (Brief at 4), nothing in the cited registration prevents registrant from also operating a similar restaurant. In this case, the descriptive matter would not create a significantly different commercial impression and the apostrophe "s" would hardly be noticed. We find that that the marks DIAMONDBACK and DIAMONDBACK'S A TEXAS BISTRO are very similar in appearance, sound, meaning, and commercial impression.

In a very relevant case involving restaurant services, the Federal Circuit determined that there was a likelihood of confusion between the marks DELTA in typed form and THE DELTA CAFÉ and design. Dixie Restaurants, 41 USPQ2d at 1534 (more weight given to common dominant word DELTA). See also Wella Corp. v. California Concept Corp., 558 F.2d 1019, 1022, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and design held likely to be confused with CONCEPT for hair care products). Therefore, we conclude that when the marks DIAMONDBACK and DIAMONDBACK'S A TEXAS BISTRO are used on identical services, potential purchasers are likely to believe that there is, at the very least, some association or relationship to the source of those services, and therefore, confusion is likely.

In response to applicant's other arguments, there is no evidence of record to support its argument that the "term 'DIAMONDBACK' is a very dilute mark similar to such a degree that the public is inundated with this term in day to day life on an assortment of goods and services." Brief at 6. Applicant's "evidence" consists of a list containing registration and/or application numbers, the mark and the status of the application or registration. Such a printout is not proper evidence. "[W]e do not consider a copy of a

search report to be credible evidence of the existence of the registrations and uses listed therein. The minimum we would accept in the case of federal registrations are soft copies of the registrations themselves." In re Hub Distributing, Inc., 218 USPQ 284, 285 (TTAB 1983).

Furthermore, [a]s to strength of a mark, however, registration evidence may not be given *any* weight." Olde Tyme Foods Inc. v. Roundy's Inc., 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) (emphasis in original).<sup>4</sup>

Applicant also argues that "the purchase of Applicant's services are by sophisticated purchasers who exercise extra care with regard to purchasing such services." Brief at 2. Applicant's and registrant's services are both identified as restaurant services without any limitation as to cost or style of service. There is no evidence to support applicant's assertion that restaurant purchasers, in general, are necessarily sophisticated purchasers. In re Opus One Inc., 60 USPQ2d 1812, 1817 (TTAB 2001) ("There is no evidence in the record from which we might conclude that wine and restaurant services, in general, are necessarily expensive, or that purchasers

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<sup>4</sup> The examining attorney also noted that "there is only one subsisting U.S. Trademark Registration containing the word 'Diamondback' for restaurant services, and that registration is owned by registrant." Examining Attorney's Brief at 9.

thereof are necessarily sophisticated and careful in making their purchasing decisions"). See also Spoons Restaurants Inc. v. Morrison Inc., 23 USPQ2d 1735, 1742 (TTAB 1991). Even if the purchasers were sophisticated, this conclusion would not avoid confusion when marks as similar as the marks at issue here are used on identical services. In re Total Quality Group Inc., 51 USPQ2d 1474, 1477 (TTAB 1999) ("We recognize applicant's attorney's point that its software is expensive and that purchasers of it are likely to be sophisticated. Suffice it to say that no evidence in support of these assertions was submitted. In any event, even careful purchasers are not immune from source confusion"). See also In re Hester Industries, Inc., 231 USPQ 881, 883 (TTAB 1986) ("While we do not doubt that these institutional purchasing agents are for the most part sophisticated buyers, even sophisticated purchasers are not immune from confusion as to source where, as here, substantially identical marks are applied to related products").

Regarding applicant's argument that there is a large geographical distance between the parties, this is not significant inasmuch as the cited registration is geographically unrestricted. Giant Food, Inc. v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ 390, 393 (Fed.



Cir. 1983) ("Section 7(b) of the Trademark Act of 1946, 15 U.S.C. §1057(b), creates a presumption that the registrant has the exclusive right to use its mark throughout the United States. Therefore, the geographical distance between the present locations of the respective businesses of the two parties has little relevance in this case"); Amcor, Inc. v. Amcor Industries, Inc., 210 USPQ 70, 73 (TTAB 1981) ("[T]he possible geographical separation between the parties, although the evidence does show an overlap on occasion, is of no significance in this proceeding because applicant is seeking territorially unrestricted registrations for its marks and, if granted, the presumptions afforded the registrations under Section 7(b) include a presumption of use or the right to use the registered marks throughout the United States").

Decision: The Examining Attorney's refusal to register applicant's mark DIAMONDBACK'S A TEXAS BISTRO for restaurant services on the ground that it is likely to cause confusion with the registered mark DIAMONDBACK also for restaurant services under Section 2(d) of the Trademark Act is affirmed.